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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-237

OLIVER M. HENRIKSON, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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OLIVER M. HENRIKSON, *Petitioner*

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Petitioner, Oliver M. Henrikson, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit, entered in the action entitled, "United States of America, plaintiff/appellee v. Oliver M. Henrikson, defendant/appellant on the 7th day of May, 1973.

CITATIONS TO OPINIONS BELOW

The Memorandum and Order of the Honorable Sherrill Halbert, Judge of the United States District

Court for the Eastern District of California denying the original Motion of the United States for Summary Judgment appears at Appendix A. The Memorandum and Order of the United States District Court for the Eastern District of California and the Order for Summary Judgment and Judgment pursuant thereto appears at Appendix B. The Memorandum of the United States Court of Appeals for the Ninth Circuit appears at Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on the 7th day of May, 1973. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Does the District Court have jurisdiction to determine the validity of a mill site claim at the time pending before the Bureau of Land Management?

2. Does the Administrative Procedure Act require a decision by the Bureau and limit the function of the District Court to reviewing such a decision?

3. If the District Court had such jurisdiction did it err in granting Summary Judgement where there remained a genuine issue as to a material fact and where said Court failed to make a finding as to whether or not defendant had a valid existing right

in said mill site claim at the time the subject land was withdrawn by executive order?

STATUTES INVOLVED

The basic statutory provisions involved herein are: 5 U.S.C. §1001 et seq., the Administrative Procedure Act. 30 U.S.C. §42 (b), as enacted March 18, 1960, providing as follows:

> Where non-mineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such and may be patented therewith subject to the same requirements as to survey and notice as are applicable to placers. No location made of such non-mineral land shall exceed five acres and payment for the same shall be made at the rate applicable to placer claims which do not include a vein or lode.

STATEMENT OF THE CASE

This is a suit by the plaintiff United States in ejectment and for damages.

In 1949 the defendant located a ten acre mineral claim known as the "Squaw Valley Claim". In 1953 the defendant located an adjoining twenty acre claim known as the "Squaw Creek Claim". The Squaw Valley Claim has gone to patent, and is therefore

owned in fee by the defendant. It is relevant, but not at issue in the present litigation. The Government seeks to eject the defendant from the Squaw Creek Claim only.

By Public Land Order 1817, dated March 12, 1959, the lands at issue herein were withdrawn for use of the Forest Service as a recreation area "subject to valid existing rights". (Record on Appeal 135).

The original Squaw Creek mineral claim was the subject of prior litigation culminating on May 16, 1966 when the United States Supreme Court denied certiorari, thereby denying defendant's claim that the land was mineral in character. *Henrikson v. Udall,* 229 F. Supp. 510, 350 F.2d 949 (9th Cir. 1965), cert. denied, 384 U.S. 490 (1966).

Thus the twenty acre Squaw Creek Claim was declared invalid. Subsequent to the filing of the complaint herein the defendant filed a millsite claim on five acres of the former Squaw Creek mineral claim. The notice of location of the millsite claim was recorded December 15, 1967. (Record on Appeal 139).

The Government contends that by virtue of the Public Land Order hereinbefore mentioned, the five acres in question are no longer subject to mining and millsite location and were not subject to millsite location at the time of defendant's claim.

The five acres at issue herein is presently being used by the defendant for his machinery to process the sand, gravel, and other minerals coming from the valid Squaw Valley mineral claim. 30 U.S.C. Section

42 (b) does not require any specific time within which a millsite shall commence to be used as such, and no annual expenditure is necessary on a millsite, nor is any statutory expenditure required thereon.

The millsite was occupied by the defendant and used as such long before March 12, 1959 the date of the order withdrawing this land from appropriation. The decision of the Department of Interior with respect to the Squaw Creek mineral claim (Record on Appeal 72) shows that the Squaw Creek Claim was located in 1953, long before the withdrawal order, and that the defendant has ever since that time been in possession of the claim and has, in fact, been using it as a millsite.

The reason that the notice of location as a millsite was not recorded until December 15, 1967 was that under the legislation hereinbefore cited, a millsite location had to be on non-mineral land. Between 1953, when the claim was originally located, and 1966 when the United States Supreme Court denied certiorari in the prior proceedings, the defendant was contending that the land was mineral in character. The defendant again raised this contention in the present action. However, by a series of motions and orders thereon, the District Court in this action held that the decision of the Department of the Interior was binding, could not be relitigated in these proceedings, and, pursuant to that decision, held that the land involved was in fact non-mineral.

Defendant then contended that if the land is non-mineral it has been used ever since its location for the

purpose of processing materials from the adjacent ten acre Squaw Valley mineral claim.

Thus the issue as far as ejectment is concerned in the present action has been reduced to that of whether or not the five acre millsite location is valid.

It is vitally important to note that the millsite claim has never been acted upon by the Bureau of Land Management and is still pending before that Bureau.

On January 10, 1968 plaintiff filed a motion to strike portions of defendant's amended answer. (Record on Appeal 48). On June 17, 1968 the Honorable Thomas J. MacBride granted plaintiff's motion in all particulars with the exception of that portion of the first affirmative defense to the first cause of action, which presented the millsite issue. With respect to that issue, the Court found that the briefs did not afford a sufficient basis for the Court to render a decision at that time. Plaintiff was allowed sixty days within which to renew its motion in that regard. (Record on Appeal 124, 128).

While that matter was under submission plaintiff filed a motion for summary judgment on the issue of ejectment. (Record on Appeal 113). On July 22, 1968 plaintiff filed a renewed motion to strike the first affirmative defense. (Record on Appeal 129).

On May 28, 1969 the Honorable Sherrill Halbert entered an Order denying both the motion for summary judgment and the renewed motion to strike the first affirmative defense without leave to renew either of said motions. (Record on Appeal 148, Appendix A).

More than seven months later, on January 16, 1970, plaintiff filed a renewed motion for summary judgment on the issue of ejectment. (Record on Appeal 151). On December 24, 1970, the Honorable Philip C. Wilkins entered an Order granting plaintiff's motion for summary judgment. (Record on Appeal 172, Appendix B).

The basis for plaintiff's renewed motion for summary judgment was the contention that Judge Halbert was laboring under a mistake of fact and a mistake of law. Judge Wilkins found that the mistake of fact under which Judge Halbert allegedly labored at the time of his decision was not significant to the decision he made (Record on Appeal 173). However, Judge Wilkins did hold that Judge Halbert was laboring under a misconception of the law when he held that the Court was without jurisdiction to proceed to final judgment while a millsite claim was on file with the Bureau of Land Management. (Record on appeal 173).

It was from this order that the appeal to the United States Court of Appeals for the Ninth Circuit was taken.

REASONS FOR GRANTING THE WRIT

The most important issue presented by this Petition is the question of whether or not the District Court has jurisdiction to determine the validity of claims such as the one filed with respect to the mill site in this case while those claims are pending before agencies such as the Bureau of Land Management. The Administrative Procedure Act, 5 U.S.C. §1001 et seq. would seem to presume that questions of this type which necessarily require a good deal of expertise to determine are administrative decisions and that the Courts should be limited to a judicial review of such decisions.

The cases in the Ninth Circuit are now in conflict on that question and a definitive ruling by this Court is necessary to resolve that conflict.

ARGUMENT

I.

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO PROCEED WHILE A MILLSITE CLAIM WAS PENDING BEFORE THE BUREAU OF LAND MANAGEMENT.

Judge Halbert's Memorandum and Order denying plaintiff's renewed motion to strike defendant's first affirmative defense and motion for summary judgment was based upon the holding in *Adams v. United States,* 318 F.2d 861, 866 (9th Cir. 1963), that the Department of the Interior was the agency entrusted with the function of making the initial determination

as to the validity of claims such as defendant's mill-site claim. (Record on Appeal 149).

It would appear well settled that the Administrative Procedure Act, 5 U.S.C. Section 1001 et seq., does not permit a trial *de novo* of administrative decisions. *Noren v. Beck,* 199 F.Supp. 708 (D.C. S.D. Cal. 1961); *Adams v. United States,* supra, but instead authorizes and requires judicial review of such decisions and prescribes the standards to be applied by the Courts in reviewing such decisions.

If that basic premise is accepted, it logically follows that there must first be an administrative decision to review. This is precisely what Judge Halbert ruled.

However, Judge Wilkins' Memorandum and Order granting the renewed motion for summary judgment (Record on Appeal 172) in effect reverses Judge Halbert's decision. The basis for Judge Wilkins' decision is the opinion in *United States v. Nogueira,* 403 F.2d 816 (9th Cir. 1968). Judge Wilkins relied upon two portions of *Nogueira* in reaching his decision.

The first of these was a paragraph from *United States v. Schultz,* 31 F.2d 764 (N.D. Cal. 1929). However, Judge Wilkins correctly observed that *Schultz* was not adopted in the *Nogueira* opinion, although mentioned therein and also contained in the opinion in *Kennedy v. United States,* 119 F.2d 564 (9th Cir. 1941). Moreover, Judge Wilkins also correctly observed that the *Nogueira* opinion did not explicitly adopt the *Kennedy* holding, but instead

merely noted that the Government had relied upon *Kennedy*. (Record on Appeal 175).

The second portion of *Nogueira* relied upon by Judge Wilkins appears at page 823 of that opinion. (Record on Appeal 175). However, this language is admittedly dictum and, as Judge Wilkins observed, the *Nogueira* Court specifically stated that it was not passing upon the question of whether the District Court had jurisdiction over a cause wherein the Government was attempting to litigate the validity of a mining claim.

Nogueira, upon review, holds no more than that the District Court has jurisdiction to determine whether a mining claim is filed in good or bad faith. The *Nogueira* Court quite clearly refused to pass upon the Government's contention that the District Court had jurisdiction to pass upon the validity of a claim. 403 F.2d 823, 824.

Moreover, even if the Government were claiming bad faith in the instant case, *Nogueira* holds that such an issue is an evidentiary question to be decided upon a factual hearing, not by summary judgment. 403 F.2d 825.

Thus petitioner respectfully submits that the issue not decided in *Nogueira* should now be decided and that the apparent intent of the Administrative Procedure Act and holding in *Adams v. United States*, supra, that the initial determination with respect to the validity of such claims should be an administrative decision ought to be affirmed.

It is vitally important to the orderly processing of such claims that there be uniformity in the law as to which body has jurisdiction to determine said claims. That uniformity is not now present due to the conflict created by the decision in this action by the United States Court of Appeals for the Ninth Circuit and its decision in *Adams v. United States*, supra.

II.

EVEN IF THE DISTRICT COURT HAD JURISDICTION IT ERRED IN GRANTING SUMMARY JUDGMENT

As discussed above, it is apparent that the issue of bad faith is an evidentiary question to be decided upon a factual hearing. Thus even if the Government's reading of *Nogueira* is accepted there remains a genuine issue as to a material fact and summary judgment was therefore inappropriate.

Moreover, summary judgment upon the state of this record was also inappropriate in that the District Court made no finding and had no basis for a finding on the issue of whether or not the defendant herein had any "valid existing rights" in the millsite claim prior to the time of the withdrawal order.

The District Court held that the millsite claim was ineffective because of the intervening withdrawal order of 1959. (Record on Appeal 176-177).

However, the Public Land Order, by its terms, was not effective as to "valid existing rights". (Record on Appeal 135).

As hereinbefore discussed, the claimant had been occupying the claimed millsite and had situated thereon equipment of a substantive nature long before the withdrawal of the land from appropriation.

It is apparent from the decision of the Bureau of Land Management and the Secretary of the Interior (Record on Appeal 72), and also from the decision of the Ninth Circuit Court of Appeals in *Henrikson v. Udall*, 350 F.2d 949, cert. denied 384 U.S. 940 (1966), that in fact claimant had been occupying the five acres as a millsite and using it as such long prior to the withdrawal of the land from appropriation. No application for a millsite patent could have been made so long as it had not been adjudicated that the land was non-mineral in character. The prior proceedings before the Department of the Interior constituted such a determination of the non-mineral character of the land and made the land eligible as a millsite.

Thus the issue upon which the District Court made no finding would be whether or not the defendant had any valid existing rights by virtue of his previous occupation of the claim and as to which the Public Land Order would be ineffective.

Petitioner respectfully urges that he did have valid existing rights in the millsite claim, and, there being no finding on that issue in the District Court, respectfully urges that there are issues left unresolved and summary judgment was therefore inappropriate.

CONCLUSION

Upon the basis of the foregoing, petitioner respectfully requests this Court issue a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated, San Mateo, California,
August 1, 1973.

VIRGIL VERNON VALE, JR.,
NAGLE, VALE, MCDOWALL & COTTER,
A PROFESSIONAL CORPORATION,
Attorneys for Petitioner.

(Appendices Follow)

Appendix A.

In the United States District Court
for the Eastern District of California

Civil No. 9912

United States of America, Plaintiff,

vs.

Charles H. Henrikson and Oliver M. Henrikson, Defendants.

[Filed May 28, 1969]

MEMORANDUM AND ORDER

This is an action by the United States Government seeking ejectment of the defendant, Oliver M. Henrikson, from land situated in the Tahoe National Forest and damages for the continued occupation thereof.

The matters before this Court are plaintiff's motion to strike the first affirmative defense presented by defendants' amended answer, and a motion for summary judgment against defendant, Oliver M. Henrikson, on the issue of ejectment. The principal question before the Court, the answer to which appears to be decisive to the disposition of both motions, is whether or not defendants[1] are entitled to possession of 5 acres of land for use as a millsite.

[1]Summary Judgment was granted in favor of defendant, Charles H. Henrikson, in an order dated March 14, 1968. However, it appears that he participated in all the activities here reviewed; hence the repeated reference to *defendants*.

Defendants filed applications for patents on two claims in the Tahoe National Forest. Patent was granted on one of the claims, but the other claim was declared invalid. The 5 acres here disputed are located on the invalid claim. The Government filed this action for ejectment and damages, subsequent to which defendants filed a new claim on the 5 acres as a millsite for service of the valid claim.

The Government now contends that the 5 acres in question are no longer subject to mining and millsite location and were not at the time of defendants' claim.[2] Accordingly, the Government alleges, defendants were precluded from filing the claim and the claim is invalid.

Adams v. United States, 318 F.2d 861, decided by the Court of Appeals for the Ninth Circuit—whose pronouncements are binding on this Court—held at page 866:

> "The Department of the Interior has been granted plenary authority over the administration of public lands, including mineral lands. It is that agency which has been entrusted with the function of making the initial determination as to the validity of claims against such lands, such determination being subject to judicial review."

Since such a claim has been filed on the 5 acres, and the validity of that claim is challenged, it would ap-

---

[2]The Government has submitted an affidavit supporting its contention. The fact remains, however, that defendants were allowed to file the new claim. Although it appears that it may have been a mistake to do so, this Court will not attempt to second-guess the Department of the Interior on the matter.

pear from the holding in *Adams, supra*, that the question presented here is no longer properly within the jurisdiction of this Court. Defendants' entitlement to the land in question is a matter for the exclusive determination of the Department of the Interior.

For that reason, plaintiff's motion to strike and motion for summary judgment must be denied. However, should the Department of the Interior find the aforementioned claim invalid, plaintiff is not hereby barred from instituting appropriate proceedings at that time.

It is so ordered.

Dated: May 28, 1969.

Sherrill Halbert
United States District Judge

Appendix B

In the United States District Court
For the Eastern District of California

Civil No. 9912

United States of America,
Plaintiff,

vs.

Charles H. Henrikson and Oliver M. Henrikson,
Defendants.

[Filed Dec. 24, 1970]

MEMORANDUM AND ORDER

This is an action by the United States to eject defendants, who hold under certain claims, from lands in Tahoe National Forest. On June 17, 1968, Judge Thomas J. MacBride of this Court granted a motion to strike certain portions of defendants' amended answer except as to the portion of defendants' "First Affirmative Defense" referring to five acres claimed as a mill site. Ruling on this issue alone, Judge Sherrill Halbert of this Court filed a Memorandum and Order dated May 29, 1969, denying the motion to strike and for summary judgment as to this part, on the grounds that filing of a new claim placed the pendent matter in the jurisdiction of the Bureau of

Land Management, ousting the District Court of jurisdiction until the Bureau makes a decision.

Now the Government has filed a new motion for summary judgment on the mill-site issue, dated January 14, 1970. The motion rests on two grounds: (1) Judge Halbert's decision was based on a mistake of fact and (2) the decision was based on a mistake of law, in that the attention of the Court was not called to a case holding that the matter was properly to be decided by the Court.

Defendants contest the propriety of considering the Government's renewed motion for summary judgment. Defendants consider Judge Halbert's ruling "final and conclusive and the law of the case." However, the Court is convinced, after reading the authorities cited by plaintiff, that an order refusing summary judgment is not final but rather interlocutory in character and is subject to reopening at any time before final judgment. *See* 6 Moore, Federal Practice 2788; *Kliaguine v. Jerome,* 91 F.Supp. 809 (E.D.N.Y. 1950).

This Court finds that the "mistake of fact" under which Judge Halbert allegedly labored at the time of his decision was not significant to the decision he made. The statement in question, contained in a footnote, was really an aside, and not decisive to the case.

However, on the question of the Court's jurisdiction to proceed to final judgment while a claim was on file with the Bureau of Land Management, the Court finds that Judge Halbert's decision was made under a misconception of the law.

Judge Halbert ruled that the filing of a claim with the Bureau of Land Management ousted this Court of jurisdiction until such time as an administrative decision was made. This ruling was based on certain language in *Adams v. United States*, 318 F.2d 861 (9th Cir. 1963). *Adams* was a case brought by the Government to determine the validity of defendant's mining claims on government-owned land after the administrative process had held against defendant's claims. Defendant filed an affirmative defense and counterclaim whose apparent purpose was "to obtain a de novo judicial determination as to the validity of his claims."

Judge Halbert's opinion cited the following language in *Adams, supra* at 866:

> The Department of the Interior has been granted plenary authority over the administration of public lands, including mineral lands. It is that agency which has been entrusted with the function of making the initial determination as to the validity of claims against such lands, such determination being subject to judicial review.

Judge Halbert took this language as being jurisdictional in purport. He construed it as requiring the Court to wait upon a decision of the Bureau of Land Management before determining the validity of any claim.

In my opinion this is a misconstruction of *Adams, supra*. *Adams* was not concerned with the same problem as this case, because the administrative decision in that case had already been made. The question was

not whether the Court should wait for the administrative decision (abstention) but how far the Court should go in reviewing an already-made administrative decision (scope of review).

This Court thinks that the true doctrine is stated in *United States v. Nogueira*, 403 F.2d 816 (9th Cir. 1968). In this case the claimants argued that the Interior Department had "primary authority" over mining claims and drew "the conclusion that the district court has no jurisdiction of any kind in a case such as the one at bar," i.e., a case to determine the validity of mining claims. The district court accepted this contention, which was based on *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 83 S.Ct. 379, 9 L.Ed. 359 (1963), and several related cases. On appeal the Ninth Circuit analyzed these cases as follows:

> The express holding in *Best*, shown supra, does not support appellees' contentions. We draw from the cases above including *Best*, the conclusion that while a proceeding on a claim is pending the courts will not entertain actions by private litigants seeking to restrain the Department, compel its decision or interfere with the administrative processes; that the authorities *do not hold* that the government has no right to enter the United States courts, set up particularly for the handling of government cases, and seek to vindicate its rights to title, its rights to possession or damages for waste or trespass upon land, the title of which is in the government.

It should be noted that among the authorities which the court was analyzing were *Best v. Humboldt*

Placer Mining Co., supra, and *Cameron v. United States,* 252 U.S. 450, 40 S.Ct. 410, 64 L.Ed. 659 (1920), both of which formed the basis for the above-quoted holding of *Adams v. United States, supra,* upon which Judge Halbert's opinion rested.

The *Nogueira* court went on to note that the government had relied upon *Kennedy v. United States,* 119 F.2d 564 (9th Cir. 1941), which in turn cited *United States v. Schultz,* 31 F.2d 764 (N.D. Cal. 1929). *Schultz* contained the following language:

> But the United States having title the tribunals are always open to it to vindicate its rights therein, either that of the Land Department or that of the courts at its election if proceedings are initiated by it. (31 F.2d at 764)

It is true that the *Nogueira* court merely noted the Government had relied on this case and the court did not explicitly adopt it as a basis for the decision. Nevertheless, the court did not disapprove the government's reliance upon the case as it did disapprove of the claimants' reliance upon the *Best* and *Cameron* cases. Within the context this is almost tantamount to adoption and approval. Technically speaking, of course, the *Nogueira* court's discussion of this question of district court jurisdiction is dictum, since the court, at 413 F.2d 823, explicitly stated that it was not passing on the question. Nevertheless, it seems proper to this Court to follow the doctrine of *Nogueira,* since, if it is a dictum, it is an extensive and well-considered dictum and appears to the Court to be a sound analysis of the question.

Having determined that it is proper for the Court to consider the Government's motion and that the Court has jurisdiction in the matter, the next question to consider is the validity of the claim itself.

As defendants admit, no notice of location of a mill site was recorded until December 14, 1967. Prior to this time, from 1953 to 1966 the land was worked and claimed as a placer claim. The fact that one location had already been made on the site necessarily precluded a second location on the same land, as each site can be subject to only one location at a time. The location of a mill-site claim would have been legally contradictory to the mineral location, as mill-site locations must be on non-mineral land. 30 U.S.C.A. Sec. 42. The earliest that the second location, as a mill site, could have been made was on the day of final adjudication by the Interior Department of the original mining claim's invalidity. This date was June 4, 1963. Unfortunately for defendants, this land had already been withdrawn from appropriation by an executive order of March 12, 1939.

Thus the location of a mill-site claim was legally impossible at all relevant times. It was legally impossible from 1953 to June 4, 1963, because of the existing mineral claim. And it was impossible from that date onward and even before because of the withdrawal order of 1959.

There is a second reason why the mill-site claim should be considered invalid. The law is that a mill site cannot be claimed independently, but only in connection with a mineral claim. As the United States

declares in its Statement of Facts and Points and Authorities, at 2: "In the years immediately following 1953 the law permitted a mill site claim to be filed only in connection with a lode claim. 30 U.S. Code 42. Not until 1960 was the law amended to permit a mill site to be related to a placer claim. 30 U.S. Code 42(b), as added March 18, 1960 by P.L. 86-390, 74 Stat. 7." Therefore defendants' attempted location of the mill site before 1960 could have had no legal effect because it was in connection with a placer claim. After 1960 it was of no effect because of the intervening withdrawal order of 1959.

It Is Therefore Ordered that plaintiff's motion for summary judgment be, and the same is, hereby granted.

Dated: December 23, 1970.

/s/ Philip C. Wilkins
United States District Judge

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United States District Court for the
Eastern District of California

Civil No. 9912

United States of America,
Plaintiff,
vs.
Charles H. Henrikson and Oliver M. Henrikson,
Defendants.

ORDER FOR SUMMARY JUDGMENT, AND JUDGMENT

The motion of plaintiff, United States of America, for summary judgment in its favor having been duly heard, and the Court having rendered its Memorandum and Order concluding that plaintiff is entitled to summary judgment,

It Is Hereby Ordered, Adjudged and Decreed that plaintiff's motion for summary judgment be and the same is in all respects granted.

It Is Further Ordered, Adjudged and Decreed that plaintiff, United States of America, have and recover possession of that certain real property situate in the County of Placer, State of California, and more particularly described as follows, to-wit:

A 20-acre portion of Section 28, Township 16 North, Range 16 East, M.D.B.& M., comprising the:

S½ of the NE¼ of the NE¼ of the SE¼; and
S½ of the NW¼ of the NE¼ of the SE¼; and
S½ of the NE¼ of the NW¼ of the SE¼; and
S½ of the NW¼ of the NW¼ of the SE¼;

2. That defendants Charles H. Henrikson and Oliver M. Henrikson forthwith vacate said above described real property and surrender possession thereof to said plaintiff, United States of America; and

3. That said defendants Charles H. Henrikson and Oliver M. Henrikson be and they are hereby permitted access to said premises as necessary to remove movable personal property therefrom to and including ninety (90) days from the entry of this judgment.

It Is Further Ordered, Adjudged and Decreed that the Court retain jurisdiction of said proceeding for the determination of the issue of damages sustained herein by the plaintiff, United States of America.

Dated: _____

Judge, United States District Court,
Eastern District of California

A copy of the foregoing Order for Summary Judgment, and Judgment was this day mailed to:

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San Mateo, California 94403
Attorneys for defendants
Charles H. Henrikson and
Oliver M. Henrikson

Dated: January 15, 1971.

Dwayne Keyes
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By J. Harold Weise
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Special Assistant to the
United States Attorney
Attorneys for Plaintiff

Appendix C

In the United States Court of Appeals
For the Ninth Circuit

No. 71-1601

United States of America,
Plaintiff-Appellee,

vs.

Charles H. Henrikson and Oliver M. Henrikson,
Defendants-Appellants.

[Filed May 7, 1973]

Appeal From the United States District Court
for the Eastern District of California

MEMORANDUM

Before: Hufstedler and Choy, Circuit Judges, and Taylor*, District Judge

PER CURIAM:

The United States of America initiated this action against the appellants, Charles H. Henrikson and Oliver M. Henrikson, on August 25, 1966 seeking to eject the Henriksons from the Squaw Creek placer claim and to recover damages for the wrongful use of that property.

*The Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

On January 18, 1971 the district court made and entered a summary judgment against the Henriksons, awarding possession of the property in question to the United States and retaining jurisdiction for the determination of the damages which may have been sustained by the United States. The Henriksons on this appeal are contending: (1) That the district court did not have jurisdiction over the action while there was pending in the Department of Interior an application for the issuance of a patent to a millsite location on the land in question, and (2) that based on the record in the case, the district court erred in granting a summary judgment in favor of the United States. We find these contentions without merit and affirm the judgment of the lower court.

The record reveals that on December 15, 1967, subsequent to the institution of this action on August 25, 1966, the Henriksons filed a notice for a millsite location on the five acres of land in question within the boundaries of a mining claim which had been declared null and void by the Secretary of Interior in 1963, which decision was thereafter affirmed by this court. *Henrikson v. Udall,* 350 F.2d 949 (1965), cert. den. 384 U.S. 940.

An application for a patent on the millsite claim was filed July 24, 1968. Prior thereto, on March 12, 1959, by Executive Order No. 1817, 24 Fed. Reg. 1984, the land in issue was withdrawn from appropriation.

Appellants primarily rely on *Adams v. United States,* 318 F.2d 861 (9th Cir. 1963) as authority for

their position as to jurisdiction. The issues in that case were entirely different than the issues presented here and that decision does not lend support to appellants' contention in the circumstances here.

The record here reveals that at the time the action was commenced, the land in issue was not subject to location by the Henriksons as a millsite. Also, the location notice was not filed until after this action was instituted to eject appellants from land owned by the United States.

In *United States v. Nogueira,* 403 F.2d 816 (9th Cir. 1968), this court at page 823 concluded:

> " . . . that the authorities *do not hold* that the government has no right to enter the United States courts, set up particularly for the handling of government cases, and seek to vindicate its rights to title, its rights to possession or damages for waste or trespass upon land, the title of which is in the government."

Also, at page 824 of the same opinion, this court stated:

> "We are led to this conclusion by the delays and confusion which would follow if as soon as one mining claim were held invalid, another was filed. If in each instance the government would have to await the determination of the validity of the mining claim to be made by the Department of Interior, the government could thus be forever kept out of possession of its property."

In light of the decision in *Nogueira,* supra, the district court had jurisdiction to entertain this action, even though the appellants had filed a millsite claim

in conjunction with an amended notice of location for a placer claim during the pendency of the litigation initiated by the government.

We agree that if the rule were otherwise, the appellants could keep the United States out of the possession of its property for an indefinite period of time by filing one claim after another.

Appellants next contend that even if the district court had jurisdiction, it erred in granting summary judgment for the reason that there was a genuine issue as to a material fact in regard to an issue of bad faith and an issue of whether the appellants had any valid existing rights in the millsite claim prior to the withdrawal Order of 1959. We disagree.

An examination of the record reveals that there was no genuine issue of a material fact for determination by the trial court. The question presented on the undisputed facts was and is whether the appellants had any legal rights in and to the millsite claim.

It is clear from the record that the location of the millsite claim was legally impossible from 1953 to June, 1963 because of an existing mineral claim on the same ground and also because of the withdrawal Order of March 12, 1959.

Appellants claim that they had some rights in the land as a millsite prior to the time it was withdrawn. This is inconsistent with their position that it was mineral land on which they were seeking a patent. A millsite location must be on non-mineral land. Title 30, U.S.C., §42. The location of a millsite on the land could not have been made until after the final adjudi-

cation by the Interior Department that the land was non-mineral which was in June, 1963. Prior to this time, the land had been withdrawn from appropriation by the Order of March 12, 1959. It is clear that appellants could not legally locate the millsite claim on land which had been withdrawn from appropriation and to which they had previously sought a patent as mineral land. There was no genuine issue as to any material fact for determination by the trial court.

The judgment is affirmed.